IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29/11/2004

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THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE S. ASHOK KUMAR

WRIT PETITION NO.25329 OF 2002

1. Union of India,rep. by the
Divisional Railway Manager,
Southern Railway, Madurai.

2. Assistant Personnel Officer,
Madurai Division,
Southern Railway, Madurai.

3. Senior Divisional Commercial Manager,
Madurai Division,
Southern Railway, Madurai.

4. Assistant Commercial Manager,
Madurai Division,
Southern Railway, Madurai. .. Petitioners

-Vs-

1. The Registrar,
Central Administrative Tribunal,
Madras Bench,
Chennai 600 104.

2. A. Thangavelu,
S/o. Arthanari Asari,
c/o.R. Ganesh,
No.20, Sarojini Street,
Thallakullam Post,
Madurai 625 002. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Certiorari as stated therein.

For Petitioners : Mr.R. Thyagarajan
Senior Counsel for
Mr.V.R. Gopalan

For Respondent-2 : Mr.K. Chandru
Senior Counsel for
Mr.R.Rengaramanujam

:O R D E R

(The order of the Court was made by P.K. MISRA, J)

The Union of India and its subordinate officers of the Railways have filed this writ petition against the order passed by the Central Administrative Tribunal in O.A.No.753 of 2001 dated 12.2.2002, where under the Tribunal has quashed the order dated 27.4.2000 discharging the present Respondent No.2 from service.

2. The present Respondent No.2 was appointed as a Lascar in April, 1 998 and in August, 1998 he was conferred temporary status. On 5.11.1 999, a charge memo was issued against the present Respondent No.2 on the allegation of unauthorised absence from his service from 18.1.199 9 to 27.4.2000. Subsequently, an enquiry was conducted and the Enquiry Officer found that Respondent No.2 was guilty of the charges. Such report was communicated to Respondent No.2. At that time, he has submitted a representation for production of muster rolls covering the entire period of the alleged unauthorised absence. While the matter stood thus, on 3.3.2000, the disciplinary authority withdrew the enquiry report and ordered for a fresh enquiry. On 15.3.2000, the enquiry officer recorded a finding indicating that the charges have been proved. At that stage, Respondent No.2 was allowed to rejoin on 23.4.2000. However, just a few days thereafter, he was discharged from service as per order dated 27.4.2000. The relevant portion of the said order is to the following effect :-
"... Sr. Divisional Commercial Manager, Madurai, vide his note No.U/C.325/Sr.DCM/Misc. dated 26.4.2000, has advised that the said Shri A. Thangavel has been unauthorisedly absenting from duty since 18.01.19 99 onwards and that his performance as Sub.Bungalow Lascar is quite unsatisfactory and hence he does not require the services of the said Shri A. Thangavel.
WHEREFORE, in accordance with the terms and conditions of his engagement, the said A. Thangavel who has not worked for one year continuously, is discharged from his engagement as Sub.Bungalow Lascar with immediate effect. He shall be paid a sum equivalent to the amount of his pay plus allowances for a period of 14 days, calculated at the same rate at which he was drawing then immediately before his discharge, in lieu of 14 days notice period."

Thereafter, the present Respondent No.2 preferred appeal before the Appellate Authority. However, since the appeal had remained pending, Respondent No.2 filed O.A.No.27 of 2001, which was disposed of on 8.1.2001 directing the authorities to dispose the appeal dated 24.5.2000. Following the aforesaid direction, the Appellate Authority passed the order dated 12.3.2001 confirming the earlier order of discharge dated 27.4.2000. Respondent No.2 filed O.A.No.753 of 2001, which has been allowed by the

Tribunal. The Tribunal has come to the conclusion that the order of discharge passed by the authority has cast stigma on the present Respondent No.2 and such order cannot be sustained. The Tribunal has directed that the present Respondent No.2 should be reinstated with all consequential benefits. The said order is being impugned in the present writ petition.

3. Learned Senior counsel appearing for the petitioners has submitted that since an order of discharge simplicitor was passed in accordance with the terms and conditions of the agreement of employment, there was no illegality in such order and the Tribunal should not have interfered with the order of discharge.

4. Learned Senior counsel appearing for Respondent No.2 on the other hand has submitted that in the present case, keeping in view the background that two enquiries had been held and finding of guilt had been recorded, the order of discharge amounted to imposing punishment without following the principles contained in Article 311(2) of the Constitution inasmuch as no second show cause notice had been issued to Respondent No.2, and therefore, the order of discharge was illegal.

5. In (1999) 2 SCC 21 (RADHEY SHYAM GUPTA v. U.P. STATE AGRO INDUSTRIES CORPORATION LTD. AND ANOTHER), it was observed :-

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee- even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.

6. Similar principles were followed in the subsequent decisions reported in (1999) 3 SCC 60 (DIPTI PRAKASH BANERJEE v. SATYENDRA NATH BOSE NATIONAL CENTRE FOR BASIC SCIENCES, CALCUTTA AND OTHERS) and (2000) 5 SCC 152 (CHANDRA PRAKASH SHAHI v. STATE OF UTTAR PRADESH AND OTHERS).

7. Many of the earlier decisions were analysed and discussed in the subsequent decision of the Supreme Court reported in (2002) 1 SCC 52 0 (PAVANENDRA NARAYAN VERMA v. SANJAY GANDHI PGI OF MEDICAL SCIENCES AND ANOTHER), upon which strong reliance is placed by the learned Senior Counsel for the petitioners. On facts, the ratio of the said decision is not applicable. Even in the said case, it was observed :-

 21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be puni tive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

8. Following the ratio of the aforesaid decisions, if the factual backdrop of the present case is analysed, there is no escape from the conclusion that in the present case the alleged misconduct of the Respondent No.2, remaining absent, was the foundation for the order of discharge and as such, since the order of discharge was without completing the enquiry and without issuing second show cause notice, such order was illegal.

9. In the impugned order of discharge itself, there is reference to unauthorised absence of the Respondent No.2. A full-fledged disciplinary proceedings had been initiated, but for some unknown reasons, the authorities without concluding the enquiry in a manner known to law, allowed the Respondent No.2 to join and passed the order of discharge within few days thereafter. Tenor of the order itself casts stigma. Moreover, such order had been preceded by two abortive disciplinary proceedings.

10. Keeping in view the aforesaid aspects, we agree with the conclusion of the Tribunal that the order of discharge amounted to a punishment and was liable to be quashed as the principles under Article 311 (2) had not been followed.

11. Learned Senior counsel for the petitioners has submitted that even assuming that the order of discharge was improper, the Tribunal was not justified in directing reinstatement with all consequential benefits, including the backwages. He has submitted that Respondent No.2 may be allowed to rejoin, however, backwages should not be paid.

12. Learned Senior Counsel appearing on behalf of Respondent No.2, on instructions from the Respondent No.2, who was present in Court, has submitted that the Respondent No.2 should be reinstated with all service benefits, save and except the payment of backwages.

13. Having regard to the facts and circumstances of the case and keeping in view the fact that Respondent No.2 was absent for a considerable period of time and was somewhat responsible for the ultimate action, he should not be allowed the benefit of backwages. Accordingly, the order of the Tribunal is modified and it is directed that the Respondent No.2 shall report before the third petitioner, the Senior Divisional Commercial

Manager, Madurai Division, Southern Railway, Madurai on 10th December, 2004. He shall be deemed to be in service and the entire period shall be taken into account for all service benefits such as seniority, increments, etc., but he shall not be entitled to any backwages till he rejoins on 10.12.2004.

14. The writ petition is accordingly disposed of, subject to the aforesaid direction. No costs.

Index : Yes
Internet: Yes

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To

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